United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-1408 B

To be argued by
IRWIN KLEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

G. CARMAN RIDLAND,

Appellant.

BRIEF FOR APPELLANT

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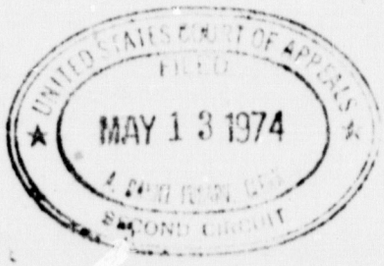

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Statutes

15 U.S.C. 77q

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

15 U.S.C. 77X

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Constitutional Amendments

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Issues

1. Did the trial judge commit reversible error in denying appellant's motion for a mistrial by reason of the submission to the jury of Exhibit 40A, part of which had been excluded therefrom and directed to be masked, but which was not masked and which was exposed to the jury?

2. Did the trial judge commit reversible error thereby, in permitting the jury to speculate that such withdrawal entry of $35,000.00 upon the monthly bank statement of Cadgie Taylor Inc. could have been the source of the alleged $40,000.00 undisclosed cash commission purportedly paid to the underwriters?

3. Did the trial judge commit reversible error thereby, in permitting the jury to speculate that such withdrawal entry corroborated the contention of the prosecution that there was such a $40,000.00 undisclosed cash payment?

4. Was appellant denied a fair trial and due process of law by reason of the undue and overparticipation and intervention of the trial judge in behalf of the prosecution and prosecution witnesses?

5. Was appellant deprived of the effectiveness of counsel and denied a fair trial and due process by reason of the threats by the trial judge to defense counsel?

6. Was appellant denied a fair trial and due process by the summary dismissal of the jury for the evening by the trial judge immediately upon ascertaining that the jury had

acquitted one of the co-defendants and had given favorable instructions concerning the appellant and other co-defendants?

7. Was such premature action by the trial judge in dismissing the jury for the evening, an intrusion into the deliberations of the jury so as to halt the momentum of acquittal which they had exhibited?

Statement of the Case

Appellant and two others were charged with one (1) count of conspiracy to violate the securities laws (15 U.S.C. 77q, 77X and 18 U.S.C. 371) and five (5) substantive counts of using the mail in connection therewith (15 U.S.C. 77q, 77X and 18 U.S.C. 2).

Specifically, the thrust of the conspiracy count was that a $40,000.00 cash commission was paid to the underwriter of a public offering of Cadgie Taylor Inc. stock, but not disclosed (403a, 404a, 430a-433a).

The appellant was a principal of the company which went public.

Significantly, the indictment did not contain any substantive charge in connection with such alleged $40,000.00 payment.

The five (5) substantive counts merely referred to mailings to five (5) people.

The appellant and one co-defendant (Feis) were found guilty after a jury trial in the Southern District of New York before Hon. Murray I. Gurfein. Another co-defendant (Steele) was acquitted.

On the 7th day of March, 1974, the appellant was sentenced to a term of three (3) years, of which four (4) months shall be spent in a jail or treatment type of insti-

tution; the remainder of the term being suspended and the appellant placed on probation.

Appellant appeals from such judgment of conviction.

Appellant is at liberty on his own recognizance pending the determination of this appeal.

The key issue in the case was whether or not the jury believed that such a $40,000.00 undisclosed cash commission had been paid to the underwriter (403a, 404a, 430a-433a).

There was no direct proof in the case that such monies had come from Cadgie Taylor, Inc.

Indeed, there was no proof that the assets of Cadgie Taylor, Inc. had been diminished by any such undisclosed cash payment.

The key government witnesses consisted of three members of the underwriting firm of Kelly, Andrews and Bradley, viz; Schiffman, Bassani and Widlitz.

They testified as to conversations with Feis, the co-defendant and original underwriter that they would take over the underwriting for an extra fee of $40,000.00.

They further testified that they received such payment on November 5, 1970 (83a, 84a, 185a, 186a).

Hence, the government's case was bottomed solely upon the credibility of such witnesses.

Needless to say, their credibility was strongly attacked. They each admitted their involvement in the instant crime, as well as others.

The prosecution offered a bank statement of Cadgie Taylor, Inc. into evidence. Counsel for the appellant objected thereto upon the grounds that such statement contained two (2) withdrawal entries; one for $35,000.00 on

November 3, 1970 (259a, 439a) and the other for $50,000.00. The trial judge originally upheld such objection as to such two items and directed that they be excised and marked and refused to permit the prosecutor to ask questions pertaining thereto. Except therefor, the bank statement was admitted into evidence as Exhibit 40A, presumably with the $35,000 withdrawal then marked (389a, 390a). Subsequently, the prosecutor connected the $50,000.00 withdrawal to a corresponding deposit in that amount, whereupon the judge directed that the mask be removed from the $50,000.00 item, but was to remain over the $35,000.00 withdrawal item (19a, 20a, 258a, 268a, 279a, 280a, 293a, 294a, 297a, 298a, 303a-308a, 324a-326a, 337a-340a, 345a, 349a-352a, 354a-358a, 373a, 374a, 389a-392a, 403a, 404a, 412a, 414a-427a).

Counsel assumed that either the prosecutor who offered such exhibit or the clerk had so masked same prior to marking (421a, 426a). The most significant and damaging part of such unmasked withdrawal entry of $35,000.00 on the Phoenix Bank statement of the company for November, 1970, is that it is dated November 3, 1970 (259a, 439a) and Schiffman testified that the underwriter received the undisclosed cash payment in New York two days later on November 5, 1970 (83a, 84a).

The jury requested all bank statements be sent to the jury room. Shortly after the jury retired, counsel was informed that Exhibit 40A did not contain a mask over the $35,000.00 withdrawal entry. Counsel immediately telephoned the judge from his robing room to his chambers and requested relief (417a). Counsel was told by the judge to find the minutes in which masking was directed (418a). Counsel did so although time was running and read such section of the minutes to the judge and moved for a mistrial, which was denied (419a, 420a).

Thus the jury had before it an exhibit which had been ordered to be excluded in part and from that part they

were permitted to speculate that there was a $40,000.00 cash payment as well as the source thereof.

Repeatedly, during the testimony of the principal government witnesses; Schiffman in particular, the judge volunteered explanations of various underwriting terms. In many instances he would ask the witness if that was what he had meant. These interruptions were so numerous that the testimony of Schiffman was submitted to the jury, permeated with the testimony of the judge and inseparable therefrom (13a-16a, 23a-30a, 32a, 36a-38a, 43a, 46a, 47a, 49a, 50a-64a, 68a, 70a, 71a, 73a, 76a-82a, 85a-96a, 98a, 106a, 113a, 114a, 122a-124a, 164a-171a, 175a, 176a, 180a-184a, 203a-206a, 208a-210a, 213a-216a, 220a, 221a, 227a, 233a-237a, 239a, 253a). The testimony of the judge appeared to be an extension or continuance of Schiffman's testimony and leant an aura of respectability and credibility to an otherwise incredible witness. The judge's testimony was in addition to the witness' testimony. Appellant contends that such an invasion of the witness chair by the judge constitutes an abuse of judicial discretion. Objections were noted (156a-162a, 166a).

Moreover, upon several occasions during the course of the trial, the judge in the presence of the jury, threatened defense counsel that if counsel asked certain questions, the judge would permit the prosecution to divulge other matters (143a, 144a, 189a-193a, 223a-225a, 229a-231a, 330a, 331a). When counsel thereby refrained from pursuing such information, the jury was left with the impression that counsel did not want the entire story disclosed. Counsel's right to cross-examine was thereby curtailed and the appellant was deprived of the effective assistance of counsel, as well as due process. Objections were noted (254a-257a).

In addition, the judge unfairly belittled a defense witness (358a-360a, 378a-384a, 395a).

The jury received the case at midday. Approximately at 6:00 P.M. on the first day of deliberation, they returned to the courtroom and asked for instructions. The Judge instructed the jury that if they found no undisclosed cash payment to the underwriter, they must acquit (430a-433a). However, he then asked the jury whether they had reached any partial verdict and when the jury reported that they had already decided to acquit one of the co-defendants but were still deliberating as to the fate of the appellant and the other co-defendant, the judge summarily discharged the jury for the evening (430a-433a). By the time they assumed deliberations on the next morning, the effect, thrust and impact of the judge's response to their question had been dissipated and the momentum of acquittal had been slowed to a hault. Appellant contends that the discharge of the jury before they had the opportunity to apply the judge's instructions, particularly after only having deliberated for a few hours, also constitutes an abuse of discretion and an invasion of the jury box. Objection was noted (434a, 435a).

The case was hard fought and the issues closely contested and the jury deliberated for two days and acquitted one of the defendants.

There was no overwhelming proof of guilt.

Appellant contends that the errors cited probably influenced the verdict of guilty to the prejudice of the appellant.

POINT I

A mistrial should have been granted upon discovering that the $35,000.00 withdrawal entry upon the bank statement of Cadgie Taylor, Inc., which was to have been masked as directed by the trial judge, was sent to the jury room unmasked.

The jury may consider only matter which has been admitted in evidence.

In *U.S.* v. *Adams*, 385 F2d 548 (2d Cir. 1967), this Court, at page 550, stated:

> "In the present case the writing had never been received at all. The principle that the Jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted." See also *Osborne* v. *U.S.*, 351 F2d 111 (8th Cir. 1965).

Similarly in *U.S.* v. *Shafer*, 455 F2d 1167 (5th Cir. 1972) the Court reserved a drug conviction when items not in evidence were mistakenly sent to the Jury. The Court stated at page 1170:

> "This is not a case in which the weight of the evidence is so overwhelming that the non-evidentiary matter may be considered not prejudicial. The burden is not on the defendant to show that a document erroneously in the jury room was actually read and considered by the jury, and as here, where the document has been in the jury room for a considerable time it may not be assumed that the jury did not see and consider it." (*Dallago* v. *U.S.*, 427 F2d 546, U.S. App. D.C. 1969.)

There, items which had been held inadmissible at trial were sent to the jury room inadvertently. These included

a copy of the hotel bill of one of the defendants from a hotel in Turkey. The records of the hotel had not been in evidence. Rather, one of the employees testified that someone looking like the defendant had been a guest in the hotel. He could not positively identify any of the defendants. The bill not only placed such defendant in the hotel, but also connected him with the other defendants. Similar language is contained in *Sawyer* v. *U.S.*, 303 F.2d 392; *U.S.* v. *Grady*, 185 F.2d 273; *U.S.* v. *Lewis*, 435 F.2d 421 (U.S. App. D.C. 1970).

Allowing a jury to view and consider exhibits, all or part of which are not in evidence, is error. *Leigh* v. *U.S.*, 308 F.2d 345 (D.C. Cir. 1962).

In *Dallago, supra*, a securities case, the jury had to consider voluminous exhibits and a complicated set of facts. A suspension order which was to have been removed from the files was sent to the jury room. The order contained prejudicial references to violations of law. The court noted that the possibility of prejudice was obvious because both the prosecutor and defense counsel agreed to keep the suspension order out of evidence. The government argued that there was no proof that the order was read and considered by the jurors. The court disagreed, stating that it could not be assumed that the order was not read. The jury was faced with a complicated set of facts and had to find the defendant guilty, if at all, "on the basis of inferences permitted but not compelled by circumstantial evidence." The conviction rested to a substantial degree on the credibility of the government's witnesses. Since the jury deliberated for a considerable period of time, it was evident that there was no overwhelming evidence of guilt. In such a situation there was more than a slight possibility of prejudice. Reversal was required.

The case at bar closely resembles the Dallago case. The facts were complicated and the evidence voluminous, consisting of 2,300 pages and 50 exhibits. There was no direct

evidence that an undisclosed cash commission had been paid by Cadgie Taylor, Inc. To reach their verdict, the jury must have done so based upon inferences drawn from circumstantial evidence.

That the withdrawal entry on the company bank statement was prejudicial, is obvious in light of the fact that it was ordered masked. Significantly, the alleged cash commission was substantially the same amount as the withdrawal in question.

The vice is that the jury was permitted to speculate that such unexplained withdrawal entry was the source of the funds for the undisclosed underwriter's commission and that in fact, there was a $40,000.00 undisclosed cash payment made to the underwriter. Although usually it is as much the responsibility of the defense counsel to see that objectionable portions of exhibits are removed, as it is of the prosecution, *U.S.* v. *Burket,* 480 F.2d 568 (2nd Cir. 1973), the mere failure to exercise that responsibility in this case where there is substantial prejudice to the defendant will not justify the submission of such unmasked exhibit to the jury, nor negate the actual prejudicial effect of having such entry submitted to the jury.

The submission of the $35,000.00 bank withdrawal entry to the jury was not the fault of defense counsel who assumed the marking directions had been carried out by the prosecutor who offered the bank statement in evidence, or the Court Clerk (421a, 426a).

As soon as the error was discovered, counsel called the matter to the attention of the Trial Court, who failed to remove the exhibit in its unmarked form from the jury or to declare a mistrial as requested (417a-419a).

A breach of the fundamental principle that the jury may consider only matter which has been received in evidence, "should not be condoned if there is the slightest possibility that harm could have resulted."

In the instant case, there is more than "slight" posssibility that harm resulted.

The consideration of such exhibit by the jury could have resulted in either prejudice or the possibility of prejudice to the defendant; thus mandating reversal.

It is probable that the jury considered the withdrawal entry to be the source of the undisclosed cash payment to the underwriter and that the entry influenced their decision and verdict. In such a case, submission of the entry to the jury is more than harmless error and reversal is required.

Where there is a close question of guilt, as here, and the mistake which occurred could have in any way prejudiced the appellant, which it did, any failure on the part of the defense counsel to inspect such exhibit before it were submitted should not prevent a reversal.

Although this Court affirmed in Burket, (*supra*) the evidence of guilt therein was overwhelming. Nevertheless, this Court stated at page 571:

> "A sufficient answer to the attempt to secure reversal on this score might be that defense counsel was as responsible as the prosecution for seeing to it that only proper exhibits were sent to the jury room. See *Rumley* v. *U.S.*, 293 F. 532, 557-558 (2nd Cir.) Cert. denied 263 US 713; *US* v. *Strassman*, 241 F2d 784; but see contrast, *Osborne* v. *U.S.*, 351 F2d 111, *U.S.* v. *Adams*, 385 F2d 548, where defense counsel objected with vigor, but without success. Still we would not wish to affirm on this ground if we believed that Burket suffered substantial prejudice. But we do not."

Hence, the key issue is prejudice.

Prejudice is determined by looking at the nature of the objectionable material at the quantum of evidence of guilt.

The Trial Court has already viewed the objectionable matter and excluded it and directed that it be masked (356a, 357a, 389a-392a, 414a-419a). This is tantamount to a finding that such excluded and objectionable matter is prejudicial.

There was no overwhelming evidence of guilt. The jury deliberated for two days. There was no direct evidence of the source of the $40,000 undisclosed cash payment to the underwriter. Hence, the jury was permitted to speculate that such $35,000 withdrawal was the source thereof.

This type of inference was frowned upon by Mr. Justice Cardozo who stated:

> "Circumstances and events that were innocent or indifferent were released to the jury as permitting an inference of guilt. Lights and shadows were so adjusted that the pictures were unreal."

It is impossible to say that the jury did not consider the objectionable matter and that it did not influence their verdict. Submission of such items is reversible error. *U.S.* v. *Ware,* 247 F.2d 698 (7th Cir. 1957), *Sanchez* v. *U.S.,* 293 F.2d 260 (8th Cir. 1961), *U.S.* v. *Dressler,* 112 F.2d 972 (7th Cir. 1940), *Steele* v. *U.S.,* 222 F.2d 628 (5th Cir. 1955).

POINT II

The trial judge erred in intervening, invading, participating, interfering with and in the examination and testimony of the government's key witness; making statements to counsel in the presence of the jury which were prejudicial to the appellant; and discharging the jury for the evening when the jury indicated an intention to acquit.

These three assignments of error are evidence of partiality on the part of the trial judge.

Under our system of justice, a defendant is entitled to a fair and impartial trial, i.e., a trial before an impartial judge and jury. *Gomela* v. *U.S.*, 146 F.2d 372 (5th Cir. 1944). The trial judge is charged with the responsibility of ensuring that a defendant has such a trial. He is the one responsible for the courtroom atmosphere in which "guilt or innocence may be soberly and fairly tested." *U.S.* v. *Brandt*, 196 F.2d 653 (2nd Cir. 1952).

The trial judge is more than a mere moderator. He is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Quercia* v. *U.S.*, 289 U.S. 466, *U.S.* v. *DeSisto*, 289 F.2d 833 (2d Cir. 1961).

A jury is sensitive to the opinion of the trial judge because of his position and the respect due him and the confidence which has been reposed in him and in his learning and assumed impartiality. *U.S.* v. *Lanham*, 416 F.2d 1140 (5th Cir. 1969). The influence of the trial judge on the jury is necessarily and properly of great weight; his lightest word or intimation is received with deference, and may prove controlling. *Quercia* v. *U.S.*, 289 U.S. 466, *U.S.* v. *Musgrave*, 444 F.2d 755 (5th Cir. 1971).

The jury has the sole responsibility for determining questions of fact.

The trial judge may not unnecessarily inject himself into the mainstream of the trial or add to the testimony, for then he is assuming the posture of a witness himself. *Quercia* v. *U.S.*, *supra*. Consequently, any judicial participation or comments must be aimed at aiding the jury's fact finding duties, rather than usurping them. *U.S.* v. *Marrapese*, 486 F.2d 918 (2nd Cir. 1973).

He must be on continual guard, because of his power and influence, to avoid any display indicating his fixed opinion as to the guilt or innocence of the accused. He must not allow the authority of the bench to be exploited

towards a conviction which he may privately think deserved or even required by the evidence.

The Judge presiding at a trial must conduct it in a fair and impartial manner and should refrain from making any unnecessary comments or remarks nor volunteer gratuitous remarks during the course of a trial which may tend to result in prejudice to a litigant. It is also improper for a Judge by his questions or manner to express or indicate any opinion as to the credibility or evidence of a witness by holding him out as an expert, or otherwise. A Judge should maintain an impartial attitude at all times in his conduct and demeanor. See 88 CJS Trials, section 49, page 125; section 50, page 134.

Our Courts have tended to abide by this and although reluctant to do so, have consistently reversed in instances where the trial judge has more or less by his manner or actions indicated a partiality or prejudice to one party or the other. In *U.S.* v. *Grunberger,* 431 F2d 1062 (2d Cir. 1970), page 1067, this Court stated:

> "We must be mindful however that a trial judge's responsibility to assist the jury in understanding the evidence by asking questions to clarify testimony must not be so zealously pursued as to give the jury the impression of partisanship or the impression that he believes one version of the evidence and disbelieves another." *U.S.* v. *Guglielmini,* 384 F2d 602 (2nd Cir. 1967); *U.S.* v. *Persico,* 305 F2d 534.

In the *Grunberger* case the judge repeatedly interrupted and questioned the defendant, but with the prosecution's witnesses was far more patient and moderate. This Court concluded at page 1068:

> "As a result of the courts varying style of interrogating the prosecution's prime witness and the defendant the jury might have received the impression

> that the judge believed the prosecution witnesses' version of the facts to be more plausible."

Similarly in the recent case of *U.S.* v. *Nazzaro*, 472 F2d 302 (2nd Cir. 1973), this court reversed where the trial court, on numerous occasions, had come to the aid of the prosecution witnesses. This Court in reversing, stated at page 303:

> "A judge's participation during trial whether it takes the form of interrogating witnesses, addressing counsel or some other conduct must never reach the point at which it appears clear to the jury that the court believes the accused is guilty."

Further, this Court stated at page 310:

> "Where the defendant's guilt or innocence rests almost exclusively on the jury's evaluation of the witnesses' demeanor and credibility, we cannot ignore questioning undertaken by a judge which so clearly signals to the jury the judge's partisanship. Even if a judge's interjections are not motivated by a partisan purpose he must not permit even the appearance of such an inference." *U.S.* v. *Curcio*, 279 F2d 681, 682 (2nd Cir. 1960), Cert. denied 364 US 824.

There, the judge attempted to rehabilitate the testimony given by the government's key witness. The Court noted that on frequent occasions the judge's questions rehabilitated the prosecution's witness whose credibility had been undermined by defense counsel. At other times the judge's questions appeared designed to inject doubt or uncertainty into the credibility of defense witnesses. The court held that the questions undertaken by the judge clearly indicated his partisanship and thereby deprived the appellant of a fair trial.

In *U.S.* v. *Woods*, 252 F.2d 334 (2nd Cir. 1958), this Court reversed and held that in effect, that the judge

had assumed the role of an expert witness, which was not within the scope of judicial questioning.

Similar language found in *U.S.* v. *D'Anna*, 450 F.2d 1201 (1971);

In *U.S.* v. *Jordan*, 454 F.2d 323 (7th Cir. 1971), the Court reversed because the judge may not contribute testimony for the jury's consideration.

There is also similar language to this effect in several decisions of the United States Court of Appeals for the District of Columbia. In *U.S.* v. *Barbour*, 420 F.2d 1319 (1969), the court stated at page 1321:

> "The judge must remain 'a disinterested and objective participant in the proceedings,' and principles both fundamental and indestructible in our criminal law exhort him to hold to a minimum his questioning of witnesses in a jury trial. Interrogation of witnesses tends to assimilate the court's role with the advocate's, and may tread over the line separating the provinces of judge and jury. The presumption of innocence may be jeopardized by an assumption of guilt radiated by overzealous quizzing by the judge, and the right to fair trial may be imperiled by an apparent breach of the atmosphere of judicial evenhandedness that should pervade the courtroom. There is the risk that the questioning may bear 'the seeds of tilting the balance against the accused' and place 'the judge in the eyes of some jurors, on the side of the prosecution.' There is also the danger that the judge may elicit from the witness responses hurtful to the accused—responses to which the jury may assign peculiar weight because of their ostensible judicial sponsorship.
>
> It is for reasons of this caliber that we have admonished that 'in a jury case, a trial judge should exercise restraint and caution because of the possible prejudicial consequences of the presider's interven-

> tion.' For 'jurors hold the robed trial judge in great awe and reverence' and 'his lightest word or intimation is received with deference, and may prove controlling.' Like the Seventh Circuit, 'we realize that an alert and capable judge at times feels that he can assist in developing the evidence by participating in the interrogation of witnesses' but, particularly with alternatives available, 'he would ordinarily do well to forego such intrusion upon the functions of counsel, thus maintaining the court's position of impartiality, in the eyes of the ever-observant jurors.' "

Similarly, in *U.S.* v. *Green*, 429 F.2d 754 (1970), the Court stated at page 760:

> "It is far better for the trial judge to err on the side of abstention from intervention in the case . . . That the judge may be able to examine witnesses more skillfully or develop a point in less time than counsel requires does not ordinarily justify such participation. That is not his function. As Judge Learned Hand once said 'Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.' "

The previously cited cases are obvious instances where the judge attempted to add to the evidence. There are, however, other instances where this is done more subtly. Frequently, a judge may begin questioning a witness, but the number and tenor of the questions may indicate the attitude of the court towards the witness and his version of the story. *U.S.* v. *DeSisto*, 289 F.2d 833 (2d Cir. 1961).

Here the impact was even greater. The judge repeatedly volunteered gratuitous explanations throughout the testimony of the key government witness, whose credibility was under sharp attack. The judge's explanations were so entwined with the witness' testimony that the jury was unable to sever one from the other, and consequently, accepted the

explanations of the judge as an extension of the witness' testimony. By so doing and by making the witness an expert, the judge substituted his credibility for the lack of the credibility of the witness. The view from the jury box was that the judge and witness spoke as one.

The most significant incident of judicial bias in this case is seen during the questioning of the prosecution witness, Schiffman, and the attempt by the court to add to the testimony of the witness. Adding to testimony, as opposed to clarifying it, is clearly outside the scope of judicial conduct. *Quercia* v. *U.S., supra,* and other cited cases. It also had the impact of creating the impression that the judge believed the prosecution witness. In effect, he was trying to rehabilitate or buttress the testimony of that witness against the attack upon his credibility. These attempts are properly the function of the prosecutor and not of the court. By usurping the prosecution's role, the court aligned itself with the government and lost the semblance of impartiality. *U.S.* v. *Navarro, supra.*

In *U.S.* v. *Fernandez,* 480 F.2d 726 (2nd Cir. 1973), the judge took over the questioning of the defense's expert witness. There were repeated and lengthy interventions during the witness' testimony which could have given the jurors the impression that the judge disbelieved the witness. Citing *U.S.* v. *Curcio, supra,* the court stated that a federal judge not only must not interfere for a partisan purpose; he must not even permit the appearance of such interference. At page 738,

> "When a judge interrupts the testimony of an important defense witness or interrupts him in a manner reflecting the judge's disbelief . . ."

he is departing from the standard laid down in *Quercia* v. *U.S. supra.*

Although it is usually required that objections be made under the Federal Rules of Criminal Procedure (30)

(52b), the courts will reverse a conviction where the participation by the trial court is plain error. *Hickory* v. *U.S.*, 160 U.S. 408. *U.S.* v. *Bagby*, 451 F.2d 920 (9th Cir. 1971).

In *U.S.* v. *Lanham, supra,* the judge asked extensive and searching questions. The court held that the actions of the trial judge were a clear indication that he felt that the defendant have given perjured testimony and that he set out to demonstrate this to the jury. This is a function of the prosecutor and not of the court. This is plain error. Reversal was required, although defense counsel did not object to the questioning and participation by the judge. See also, *U.S.* v. *Hoker*, 483 F.2d 359 (5th Cir. 1973).

There are also instances where the impartiality of the judge is negated by judicial comments and conduct during the course of the trial.

It is the judge's attitude which usually has the greatest effect on the jury. This is determined by viewing not only the number of times that the judge intervened, but also the tenor of the questions asked or the tone which would reveal the attitude. *U.S.* v. *Hoker, supra.*

The cumulative effect of such type of judicial conduct is evaluated in context and its potential effect on the jury so determined. *U. S.* v. *DeSisto, supra.*

Occasionally even an isolated incident will be sufficient. In *U. S.* v. *Salazar*, 293 F.2d 442 (2nd Cir. 1961), the defendant took the stand. The judge proceeded to ask questions; he also stated that he thought that the defendant had a "chip on his shoulder". The court held that the incident sufficiently prejudiced the defendant in the eyes of the jury as to deprive him of a fair trial.

In *U. S.* v. *Guglielmini*, 384 F.2d 602, cert. den. 400 U.S. 820, the colloquy was between the judge and counsel. The judge characterized the prosecutor as a young boy prosecuting his first case; while he noted that defense counsel

had been around for years. The court held that the comments put the defense at a disadvantage in the eyes of the jury. The total effect of the judge's participation in the trial was to give the impression that he believed the prosecution and disbelieved the defense.

Comments by the court threatening to allow the prosecutor to introduce evidence rebutting that introduced by the appellant cemented in the minds of the jury that the judge considered the appellant guilty. It also allowed the jury to speculate that there was more evidence which they had not seen which could be used against the appellant.

On several occasions the judge informed defense counsel in the presence of the jury, that if counsel desired to ask certain questions, the judge would permit the prosecution to rebut the effect of such questions by permitting certain disclosures. Rather than face such risk, counsel did not pursue such line of questioning. Not only was the right of cross-examination curtailed, but the appellant was denied the effective assistance of counsel (254a-257a). Moreover, the jury was thereby given the impression that the defense was less than candid and that it did not want to disclose all the facts.

In addition, the trial judge minimized the effectiveness of defense witness Hepola, by belittling her in front of the jury.

The Judge's actions in dismissing the jury for the evening, after they had just indicated that they had decided to acquit one of the co-defendants but were still deliberating as to the appellant as to whom they had just received favorable instructions would indicate that the Judge was not fair and impartial in his handling of the matter (430a-433a).

The precise timing of the judge in dismissing the jury for the evening, when considered in the context of the foregoing incidents, indicates that the judge was displeased

with the momentum of acquittal. Prejudice in this instance is very subtle, but nonetheless real. The judge in effect indicated to the jury that they were mistaken. He was influencing their determination in an improper manner. Regardless of his personal convictions concerning the guilt or innocence of the appellant, the court should have avoided any semblance of partiality and should have left the determination of that issue in the jury's hands, where it belongs. His actions in this regard reveal an attempt to block a quick acquittal after his supplemental instructions by insisting that the jury "sleep it over".

This was at 6 P.M. of the first day of deliberation which had just begun after lunch. It has been counsel's experience that jurors usually continue deliberations after dinner.

CONCLUSION

In view of the close factual question which existed regarding the appellant's guilt and the credibility of the government witness, the submission to the jury of the unmasked withdrawal entry on the company bank statement and the prejudicial conduct of the judge in inserting himself so deeply into the trial, threatening defense counsel in front of the jury and prematurely dismissing the jury for the evening, it is respectfully submitted that the judgment of conviction be reversed.

Respectfully submitted,

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